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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 01-2270
Filed January 4, 2002

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fourth day of January, Two Thousand Two.

PRESENT: HONORABLE James L. Oakes,
HONORABLE Richard J. Cardamone,
HONORABLE Fred I. Parker,
Circuit Judges.

PHILLIP ANTHONY CARR,

Petitioner-Appellant,

—v.—

JANET RENO, Attorney General of the United States; KEVIN D. ROONEY, Acting Commissioner of the Immigration and Naturalization Service; LYNN UNDERDOWN, Louisiana District Director, Immigration and Naturalization Service; IMMIGRATION AND NATURALIZATION SERVICE; U.S. DEPARTMENT OF JUSTICE,

Respondents-Appellees.

APPEARING FOR APPELLANT: Alan Michael Strauss
Bretz & Coven, LLP
New York, New York

APPEARING FOR APPELLEES: Steven J. Kim
U.S. Attorney's Office
Eastern District of
New York
Brooklyn, New York

Appeal from the United States District Court for the Eastern District of New York (Kahn, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the denial of the petition for a writ of habeas corpus by said district court be and it hereby is AFFIRMED.

Petitioner-Appellant Phillip Anthony Carr ("Carr") appeals from the denial of his petition for a writ of habeas corpus by the United States District Court for the Eastern District of New York (Kahn, J.). We affirm.

The issue in this appeal was squarely addressed in an opinion of this Court issued earlier this year. Carr argues that § 440(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, has an impermissibly retroactive effect as applied to aliens like him whose criminal conduct pre-dated the AEDPA's enactment date, even though his conviction post-dated the AEDPA's enactment date. In *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001), we held that § 440(d) does not have an impermissibly retroactive effect as applied to aliens whose criminal conduct pre-dated the AEDPA's enactment date but whose convictions post-dated the AEDPA's enactment date. The Supreme Court's subsequent affirmance of our decision in *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000), *aff'd*, 233 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), which addressed the impermissibly retroactive effect of § 440(d) as applied to aliens whose guilty pleas pre-dated the AEDPA's enactment date, does not undermine *Domond*. Accordingly, the district court properly denied Carr's petition.

For the reasons set forth above, the denial of the petition for a writ of habeas corpus entered by the district court is AFFIRMED.

FOR THE COURT
Roseann B. MacKechnie, Clerk

By: /s/ LUCILLE CARR
Lucille Carr, Operations Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

99-CV-7306 (ARR)
Filed May 9, 2001

PHILLIP ANTONY CARR,

Petitioner/Plaintiff,

—against—

JOHN ASHCROFT, Attorney General of the United States; KEVIN D. ROONEY, Acting Commissioner of the Immigration and Naturalization Service; LYNN UNDERDOWNE, Louisiana District Director, Immigration and Naturalization Service; IMMIGRATION AND NATURALIZATION SERVICE; UNITED STATES DEPARTMENT OF JUSTICE,

Respondents/Defendants.

JUDGMENT

An Order and Opinion of the Honorable Allyne R. Ross, United States District Judge, having been filed on May 7, 2001, denying the petition for a writ of habeas corpus; and lifting the order staying petitioner's removal; it is

ORDERED and ADJUDGED that the petitioner take nothing of the respondents; that the petition for a writ of habeas corpus is denied; and, that the order staying petitioner's removal is lifted.

Dated: Brooklyn, New York
May 7, 2001

/s/ ROBERT C. HEINEMANN
ROBERT C. HEINEMANN
Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

99-CV-7306 (ARR)

NOT FOR PUBLICATION

PHILLIP ANTONY CARR,

Petitioner/Plaintiff,

—against—

JOHN ASHCROFT, Attorney General of the United States; KEVIN D. ROONEY, Acting Commissioner of the Immigration and Naturalization Service; LYNN UNDERDOWNE, Louisiana District Director, Immigration and Naturalization Service; IMMIGRATION AND NATURALIZATION SERVICE; UNITED STATES DEPARTMENT OF JUSTICE,

Respondents/Defendants.

OPINION AND ORDER

ROSS, United States District Judge:

Petitioner brings this petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2241, requesting that the court review the lawfulness of his mandatory detention without bond pursuant to 8 U.S.C. § 1231(a) and the statutory applicability and constitutionality of § 304(b) of the

Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996) ("IIRIRA") and § 440(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) ("AEDPA").[1] Specifically, petitioner argues that Congress did not intend that either § 304(b) of IIRIRA or § 440(d) of AEDPA apply retroactively and that, alternatively, application of either provision to petitioner's criminal conduct which occurred prior to the enactment of either statute would have an impermissible retroactive effect. He also alleges that such application would violate his Equal Protection and Due Process rights. In addition, petitioner argues that his mandatory detention without a bond hearing violates his Fifth Amendment procedural due process rights.

Respondents argue that only Lynn Underdowne, District Director of the Immigration and Naturalization Service ("INS") in Louisiana, is the appropriate respondent in this case, and that this court lacks personal jurisdiction over her under New York's long-arm statute. As such, the respondents argues that the proper venue for this action is the Western District of Louisiana. Respondent also argue that this court lacks subject matter jurisdiction to hear petitioner's request for habeas relief, asserting that both AEDPA and IIRIRA dictate that courts of appeals have exclusive judicial review over agency decisions rendered under these acts. In addition, the respondent argues that petitioner is ineligible to apply for discretionary relief from deportation because he is subject to the permanent rules under IIRIRA and

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[1] Petitioner originally challenged his mandatory detention under § 236(c) as violating his substantive due process rights. In his first reply brief, he amends this claim, noting that a recent clarification by the Immigration and Naturalization Service renders him detained under § 241.

does not qualify for "cancellation of removal" under § 304(b). Finally, respondent argues that petitioner does not possess a fundamental right to be free from INS detention, and that the mandatory detention provision of IIRIRA is rationally related to a legitimate government purpose and, thus, is constitutional.[2]

Prior to assessing the merits of Mr. Carr's petition, the court indicated to the parties that it would withhold any ruling on the petition until the Supreme Court and the Second Circuit had weighed in on the issue of the retroactivity of AEDPA and IIRIRA in *St. Cyr v. I.N.S.*, 229 F.3d 406 (2d Cir. 2000), *cert. granted*, 121 S. Ct. 848 (Jan. 12, 2001) and *Pena-Rosario v. Reno*, 83 F. Supp.2d 349 (E.D.N.Y. 2000), respectively. However, since that time, the Second Circuit has issued an opinion directly on point with regard to the retroactivity issue and, as such, the court proceeds to address the merits of the petition. For the following reasons, the court holds that (1) it possesses personal jurisdiction over respondents; (2) it retains subject matter jurisdiction over this habeas petition; (3) neither §304(b) of IIRIRA nor of § 440(d) of AEDPA is impermissibly retroactive as applied to petitioner, when he pleaded guilty to an "aggravated felony" rendering him subject to removal proceedings after the enactment of AEDPA, even though the criminal conduct occurred prior to the statute's

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[2] In his initial petition, Mr. Carr argued that his mandatory detention violated his substantive due process rights. Once the court appointed Mr. Carr counsel, he altered this claim to assert that his continued detention without a bond hearing before an impartial adjudicator violates his procedural due process rights. In a supplemental reply brief, Respondent asserted that petitioner was not entitled to such relief, and that the review process in place sufficiently afforded petitioner any procedural due process protection to which he was entitled.

enactment; (4) petitioner's procedural due process claim regarding his mandatory detention is moot.

BACKGROUND

Petitioner Phillip Anthony Carr is a forty year-old native and citizen of Jamaica. He entered the United States as a lawful permanent resident ("LPR") on September 27, 1969, when he was ten years old, and he has lived in the United States for the past thirty years. His entire family is in the United States, and his wife and four children are citizens of the United States, as are his mother and seven siblings. He was raised in New York, graduated from high school in New York, and has been employed in New York.

Mr. Carr has three criminal convictions. On March 29, 1984, he pleaded guilty to criminal possession of marijuana in the fourth degree in violation of N.Y. Penal Law § 221.15, a crime for which he paid a $250 fine. On October 1, 1987, Mr. Carr pleaded guilty to criminal sale of marijuana in the fourth degree in violation of N.Y. Penal Law § 221.40, for which he paid a $300 fine. Finally, on May 10, 1996, Mr. Carr pleaded guilty to felony possession of marijuana in violation of article 27, section 286 of the Annotated Maryland Code. The underlying criminal conduct leading to this conviction occurred on December 14, 1995. He was sentenced to five years imprisonment, but was released after forty months.

On June 23, 1998, the INS issued a notice to appear ("NTA") charging Mr. Carr with "deportability" for having committed an aggravated felony based on his convictions, INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), and for having committed a violation pertaining to a controlled substance, INA § 237(a)(2)(B)(i), 8 U.S.C.

§ 1227(a)(2)(B)(i). The INS assumed custody of Mr. Carr on April 12, 1999 and transferred him to its detention facility in Oakdale, Louisiana. On July 22, 1999, an immigration judge found Mr. Carr removable from the U.S. based on his criminal convictions and ordered him deported to Jamaica. Mr. Carr filed an appeal with the Board of Immigration Appeals ("BIA"), which dismissed his appeal on February 3, 2000, holding that § 440(d) of AEDPA and § 304(b) of IIRIRA rendered him ineligible for relief from deportation under § 212(c) of the INA, 8 U.S.C. § 1182(c) (repealed). On December 2, 1999, after Mr. Carr filed the instant habeas petition, this court instructed the government to show cause why petitioner's removal should not be stayed pending the disposition of his petition. By letter dated December 10, 1999, the government informed the court that Mr. Carr would remain in INS custody pending the court's ruling on his petition.

DISCUSSION

I. *JURISDICTIONAL ISSUES*

A. *The Court Can Reasonably Consider the Named Defendants Mr. Carr's Custodians for the Purpose of His Habeas Petition*

As a threshold matter, the court holds that Attorney General Ashcroft, Acting INS Commissioner Rooney, and INS District Director Underdowne are all "custodians" of Mr. Carr for the purpose of his habeas petition and, therefore, are appropriate respondents to this action.[3]

[3] Insofar as the government concedes that Ms. Underdowne is Mr. Carr's custodian and, thus, an appropriate respondent in this case, the court will only discuss the custodial roles of the Attorney General and Mr. Rooney.

A number of courts in this district, led by Judge Weinstein in *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997), have held that the Attorney General is a "custodian" and appropriate respondent for habeas petitions of the nature at issue in this case. While the Second Circuit has yet to rule on this matter, the court finds Judge Weinstein's reasoning in *Mojica* is persuasive and holds that the Attorney General is a proper respondent for this habeas action. *See Mojica*, 970 F. Supp. at 166-67 (citing *Nwanko v. Reno*, 828 F. Supp. 171, 175-76 (E.D.N.Y. 1993)). *See also Pena-Rosario v. Reno*, 83 F. Supp.2d at 362; *Pottinger v. Reno*, 51 F. Supp.2d 349, 357 (E.D.N.Y. 1999).

The court also finds that, for the reasons set forth at length in *Mojica* regarding the appropriateness of naming the Attorney General as a Respondent, Acting Commissioner Rooney serves a similar "custodial" function for these purposes and is a proper respondent in this matter. *See also Agramonte v. Commissioner of I.N.S.*, 2000 WL 1617999 (S.D.N.Y. Oct. 30, 2000).

B. *Personal Jurisdiction*

The court also maintains personal jurisdiction over the Attorney General pursuant to New York's Long-Arm Statute. In order to maintain personal jurisdiction over non-domiciliary respondents or defendants under this statute, it is sufficient that the individuals regularly transact or conduct business in New York, even if the cause of action has no connection to the state. *See* N.Y.C.P.L.R. § 301. As Judge Weinstein noted in *Mojica*, because the Attorney General, in his official capacity, clearly transacts business in New York, he can be reached by the New York long-arm statute. *See Mojica*,

970 F. Supp. at 168 (citing *Nwanko*, 828 F. Supp. at 175-76). *See also Pottinger*, 51 F. Supp.2d at 357.[4]

C. *Subject Matter Jurisdiction*

The government contends that this court lacks subject matter jurisdiction over Mr. Carr's habeas petition, contending that the permanent IIRIRA rules codified by 8 U.S.C. § 1252 strip district courts of habeas jurisdiction over INS detention petitions and consolidate judicial review in the courts of appeal.[5] (Resp. Memo. of Law in Opp. to Petition for Writ of Habeas Corpus at 23-40). Since the government filed its brief, however, the Second Circuit has held that IIRIRA's permanent rules do not repeal district courts' habeas corpus jurisdiction to review legal challenges to final removal orders entered against LPRs deemed removable due to prior criminal convictions. *See Calcano-Martinez v. INS*, 2000 WL 1336611 (2d Cir. 2000), *cert. granted*, 121 S.Ct. 849 (2001); *St. Cyr v. INS*, 229 F.3d at 409. As such, the court has subject matter jurisdiction over Mr. Carr's habeas petition.

II. *RETROACTIVITY OF § 440(d) of AEDPA*

Mr. Carr argues that subjecting him to either § 304(b) of IIRIRA or § 440(d) of AEDPA, and thereby preclud-

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[4] Because the court finds that both the Attorney General is an appropriate respondent and that he is subject to the personal jurisdiction of this court, the court finds it unnecessary to determine whether or not it maintains personal jurisdiction over Acting INS Director Rooney or INS District Director Underdowne. *See Pena-Rosario*, 83 F. Supp.2d at 362 (citing *Moiica*, 970 F. Supp. at 166; *Yesil v. Reno*, 958 F. Supp. 828, 835-36 (S.D.N.Y. 1997)).

[5] The government also argues that Mr. Carr failed to exhaust his administrative remedies, because his BIA appeal was pending at the time the government filed its opposition brief. Since that time, however, the BIA dismissed Mr. Carr's appeal, rendering this issue moot.

ing him from seeking a waiver for deportation under § 212(c) of the INA, would constitute an impermissible retroactive application of these statutes to conduct he completed prior to their enactment. First, he argues that the language of these provisions indicates that Congress intended that they not apply retroactively. In the alternative, he argues that the language of these statutes does not manifest a clear congressional intent to apply them retroactively and, as such, the presumption against retroactivity prevails. Second, he argues that, were the court to find an absence of a clear congressional intent on the issue of retroactivity, subjecting him to these statutes would have an impermissible retroactive effect. Finally, he argues that subjecting him to these statutes would violate his substantive due process and equal protection rights.

At the time Mr. Carr filed his petition, the question of whether § 440(d) of AEDPA could apply retroactively to pre-enactment conduct when a defendant had been convicted or had pled guilty to a deportable offense *after* AEDPA's passage had yet to be decided by this circuit. The district courts that had addressed this issue had held that such an application was impermissibly retroactive and, as such, individuals in Mr. Carr's situation could not be denied eligibility for § 212(c) discretionary relief. *See Pena-Rosario*, 83 F. Supp.2d 349; *Dunbar*, 64 F. Supp.2d 47, 53 (D. Conn. 1999). In *St. Cyr*, the Second Circuit determined that retroactive application of § 440(d) of AEDPA to individuals who had pled guilty to deportable offenses prior to the enactment of the statute was impermissible, though it explicitly noted in strongly worded dicta that such retroactive application to pre-enactment *conduct* would not be impermissible. In light of these decisions, however, this court informed the parties that it would delay any decision on Mr. Carr's petition until

the matter had been addressed by the Second Circuit's review of *Pena-Rosario* or the Supreme Court's review of *St. Cyr*.

Since that time, however, the Second Circuit has reviewed the permissibility of retroactive application of § 440(d) to individuals whose deportable criminal conduct occurred prior to the statute's enactment but whose convictions or guilty pleas occurred after AEDPA was passed. In *Domond v. I.N.S.*, 2001 WL 282645 (2d Cir. March 23, 2001), the Second Circuit overturned the district court in *Dunbar* and held that AEDPA was not impermissibly retroactive in precluding petitioner's eligibility for § 212(c) relief when he committed his deportable offense in November 1994 but did not plead guilty until November 1996, after the passage of AEDPA. *See Domond*, 2001 WL 282645, at *4-5. Because Mr. Carr's circumstances are identical to those of the petitioner in *Domond* in all relevant respects, the court finds that *Domond* governs this case, and Mr. Carr's retroactivity argument fails.[6]

III. *PETITIONER'S SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION CLAIMS*

Mr. Carr asserts that, if these statutes do apply retroactively, they violate both his substantive due process and equal protection rights. These arguments, however, are without merit. As the petitioner concedes, in these circumstances, the retroactive application of these statutes would satisfy due process if supported by a "legitimate legislative purpose furthered by rational means." *See* Pet.

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[6] The court need not conduct a separate analysis of the permissibility of the retroactive effect of § 304(b) of IIRIRA. Even were IIRIRA deemed impermissibly retroactive as applied to petitioner, he would still be subject to § 440(d) of AEDPA.

Reply Memo. of Law at 43 (quoting *Pension Benefit Guaranty Corp.v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984)) (internal quotations omitted). Similarly, petitioner's equal protection claim is analyzed under the rational basis test. *Seẽ Domond*, 2001 WL 282645, at *5 (citing *Francis v. I.N.S.*, 532 F.2d 268, 272 (2d Cir. 1976)).

The crux of petitioner's equal protection claim is that eligibility for § 212(c) relief could vary among similarly-situated individuals based on the purportedly irrational and arbitrary date on which the INS chooses to commence deportation or removal proceedings. Petitioner's ineligibility for § 212(c) relief, however, did not hinge on when he was placed in removal proceedings, but rather when he was convicted of an aggravated felony, which occurred *after* AEDPA's passage. *See Domond*, 2001 WL 282645, at *4. Congress had a legitimate purpose for limiting eligibility for § 212(c) relief for those convicted by trial or guilty plea after AEDPA's passage, namely "to enhance the ability of the United States to deport criminal aliens," and, as such, his equal protection claim fails. *Id.* at *6. For the same reason, petitioner's substantive due process claim fails as well.

IV. *PETITIONER'S PROCEDURAL DUE PROCESS CLAIM*

In his initial reply brief, petitioner argued that his detention pending his deportation pursuant to INA § 241, 8 U.S.C. § 1231, violates his procedural due process rights. A careful reading of the statutory scheme governing the detention of individuals such as Mr. Carr whose final administrative orders of deportation have been stayed pending judicial review indicates that Mr. Carr cannot raise this claim at this time. When an individual, like Mr. Carr, is convicted for an offense that falls under 8 U.S.C. § 1227(a)(2)(A)(iii) and is subject

to a final order of removal, he is mandatorily detained under INA § 236, 8 U.S.C. § 1226(c), for ninety days, during which time the INS is required to execute his removal. If the alien is not removed within ninety days, the INS district director may continue to hold the alien in custody, absent a clear and convincing showing by the alien that he does not pose a danger to the community nor poses a significant flight risk. *See* 8 C.F.R. § 241.1. This ninety-day period has been termed the "removal period." *See* 8 U.S.C. § 1231(a)(1). *See also Mamedov v. Reno*, 2000 WL 1041452, *2 (S.D.N.Y. July 28, 2000), vacated as moot, *Mamedov v. Reno*, 2000 WL 1154329 (S.D.N.Y. Aug. 14, 2000).

However, when an individual such as Mr. Carr seeks a stay of his removal pending judicial review of that order (in this case, prior to the end of the original removal period), the removal period is suspended and he remains detained pursuant to § 236. *See Rogowski v. Reno*, 94 F. Supp.2d 117, 181-82 (D. Conn. 1999) (alien facing administrative removal order due to violation falling under 8 U.S.C. § 1227(a)(2)(A)(iii) is detained pursuant to § 236 while judicial review of removal order is pending); *Martinez v. Greene*, 28 F. Supp.2d 1275, 1283-84 (D. Colo. 1998). When the court has reviewed and rejected the alien's challenge to his removal order, rendering such order final and enforceable, a new ninety-day removal period begins, during which the INS must effectuate the alien's removal. *See* 8 U.S.C. § 1231(a)(1)(B)(ii) ("If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien," the removal period begins on "the date of the court's final order.").

Mr. Carr challenges his detention under § 241 as a violation of his procedural due process rights, with an explicit focus on the sufficiency of the review mechanisms utilized to determine his eligibility for release on bail as

outlined in 8 C.F.R. § 241.4(c). *See* Pet. Reply Memo. of Law at 44-54; Pet. Supp. Reply Brief at 2-9. Because Mr. Carr's final administrative removal order was stayed pending this court's review of his eligibility for § 212(c) relief, and because I have determined that Mr. Carr is not eligible for such relief and that, therefore, his removal order is final and enforceable, the removal period commences today. The INS now has ninety days from the date of this order to remove Mr. Carr prior to his entitlement to a bond hearing under § 241(a)(6). As such, Mr. Carr's procedural due process claim is premature and is dismissed without prejudice. To the extent that the government fails to effectuate his removal within the ninety-day period and petitioner becomes eligible for discretionary release on bond, petitioner may re-institute his procedural due process claim. *See Michel v. INS*, 119 F. Supp.2d 485, 497 (M.D. Pa. 2000) (due process claim regarding review procedures in § 241 not ripe until ninety days after court rejected petitioner's challenge to his removal order and lifted stay of removal).

CONCLUSION

For the reasons stated above, plaintiffs petition for a writ of habeas corpus is denied. The order staying petitioner's removal is lifted.

The Clerk of the Court is directed to enter judgment accordingly.

SO ORDERED.

/s/ ALLYNE R. ROSS
Allyne R. Ross
United States District Judge

Dated: May 1, 2001
Brooklyn, New York

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cc: Magistrate Judge Pollak

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A18 417 739 - Oakdale

Date: February 3, 2000

In re: PHILLIP ANTHONY *CARR*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Mary Ann Berlin, Esquire

ON BEHALF OF SERVICE:

Lorraine L. Griffin
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] – Convicted of controlled substance violation

APPLICATION: None

ORDER:

PER CURIAM. In a decision dated July 22, 1999, the Immigration Judge found the respondent removable as charged and concluded that he was ineligible for any form of relief from removal. The Immigration Judge therefore ordered the respondent removed from the United States to Jamaica. The respondent has appealed from this decision. The appeal is dismissed.

On appeal, the respondent has challenged the Immigration Judge's finding of removability. First, he contends that there is no evidence to show that the conviction records submitted by the Immigration and Naturalization Service pertain to him. However, the fact that the respondent's name is identical to that of the defendant named in the conviction records is sufficient, in the absence of any evidence to the contrary, to establish that he committed the offenses described. *See Matter of Lopez*, 15 I&N Dec. 183 (BIA 1975) (holding that identity of names between respondent and person named in record of conviction permits Immigration Judge to infer that the evidence relates to the respondent); *see also Matter of Leyva*, 16 I&N Dec. 118 (BIA 1977); *Matter of Cheung*, 13 I&N Dec. 794 (BIA 1971). Accordingly, we find that the conviction records provide clear and convincing proof of the respondent's removability under sections 237(a)(2)(A)(iii) and (B)(i) of the Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii) and (B)(i). *See* section 240(c)(3) of the Act, 8 U.S.C. § 1229a(c)(3).

The alleged "vagueness" of the conviction documents does not alter this conclusion, despite the respondent's contentions on appeal. The conviction records comply with the requirements set forth in section 240(c)(3)(B) of the Act and contain sufficient information to allow a reasonable person to conclude that the respondent was convicted of three controlled substance offenses. The

respondent claims that none of these offenses constitutes an aggravated felony as defined in section 101(a)(43)(B) of the Act, but we disagree with this claim. The respondent was convicted of criminal sale of marijuana in violation of NY Penal Code § 221.40. This crime qualifies as a "drug trafficking crime" under 18 U.S.C. § 924(c) since it is punishable as a felony under the Controlled Substance Act, 21 U.S.C. § 801 et seq, and therefore constitutes an aggravated felony as defined in section 101(a)(43)(B). *See Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995); 21 U.S.C. § 841; 18 U.S.C. § 3559(a). The fact that the offense is a misdemeanor in New York does not change this conclusion. *Compare Matter of K-V-D-*, Interim Decision 3422 (BIA 1999) (finding that federal definition of felony must be applied to offenses in immigration proceedings).

The respondent's second conviction for possession of a controlled substance also constitutes an aggravated felony under section 101(a)(43)(B) of the Act. *See Matter of K-V-D-, supra*; *Matter of L-G-, supra*. This crime, like the respondent's conviction for sale of marijuana, is punishable as a felony under the Controlled Substance Act and therefore constitutes a drug trafficking crime as defined in 18 U.S.C. § 924(c). *See* 21 U.S.C. § 844; 18 U.S.C. § 3559(a). We therefore concluded that the Immigration Judge acted properly in finding the respondent removable under section 237(a)(2)(A)(iii) of the Act. The fact that two of the respondent's three convictions occurred prior to the enactment of legislation making aggravated felonies grounds for deportation does not alter this conclusion. *See Matter of Truong*, Interim Decision 3416 (BIA 1999). Accordingly, we affirm the Immigration Judge's finding of removability.

In addition, we conclude that the Immigration Judge acted properly in finding the respondent ineligible for

cancellation of removal or a section 212(c) waiver. *See* section 240A(a)(3) (indicating that aggravated felony conviction renders alien ineligible for relief); section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L.No. 104-208, 110 Stat. 3009 ("IIRIRA") (repealing section 212(c) of the Act). Section 212(c) relief is not available in removal. proceedings and neither this Board nor the Immigration Judge has the authority to grant this form of relief despite the respondent's contentions to the contrary. We also have no jurisdiction to address the respondent's constitutional challenges to the laws we administer. *See e.g. Matter of Fuentes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992). We therefore must uphold the Immigration Judge's decision and dismiss the respondent's appeal.

[ILLEGIBLE]
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A18 417 739 – Oakdale

Date: February 3, 2000

In re: PHILLIP ANTHONY *CARR*

DISSENTING OPINION:

Lory Diana Rosenberg, Board Member

I respectfully dissent.

I agree fully with the respondent's well-argued brief, with the sole exception of his contention that a state offense for the sale of marijuana would not be a felony under federal law. *See Matter of K-V-D-*, Interim Decision 3422 (BIA 1999). However, I do not believe that offense is an aggravated felony for reasons stated in my separate opinion in *Matter of Lettman*, Interim Decision 3370 (BIA 1998). I also note that the respondent appears to have been moved from the New York or Baltimore area to Oakdale for purposes of detention.

Accordingly, I would apply the law of the circuit with jurisdiction over his place of residence. *See Henderson v. INS* 157 F.3d 106 (2d Cir. 1998).

/s/ LORY DIANA ROSENBERG
Lory Diana Rosenberg
Board Member

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
OAKDALE, LOUISIANA

File No.: A 18 417 739
July 22, 1999

In the Matter of

PHILLIP ANTHONY CARR,

Respondent

IN REMOVAL PROCEEDINGS

CHARGE:	Section 237 (a) (2) (B) (i) of the Immigration and Nationality Act; an alien convicted of a violation of any law or regulation relating to a controlled substance;
	Section 237(a) (2) (A) (iii) of the Immigration and Nationality Act; an alien convicted of an aggravated felony
APPLICATIONS:	Termination and cancellation of removal under Section 240A(a)

ON BEHALF OF RESPONDENT:

Mary Ann Berlin, Esquire
10 East Baltimore Street
Suite 901
Baltimore, Maryland 21202

ON BEHALF OF THE SERVICE:

Jerry Beatmann, Esquire
Assistant District Counsel
INS
Oakdale, Louisiana 71463

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of Jamaica who was admitted to the United States as an immigrant on September 27, 1969. On March 29, 1984, he was convicted in the State of New York of the offense of possession of marijuana. On October 1, 1997, he was convicted in the Same State of the offense of sale of marijuana. On May 10, 1996, he was convicted in the State of Maryland for the offense of possession of marijuana.

In pleading to the Notice to Appear, counsel for the respondent admitted the first three allegations of fact contained therein. Allegation 4, 5, 6, and the charges of removability were denied. The hearing was continued to July 22nd, 1999 in order to receive evidence from the Service regarding the allegations which were denied.

When the hearing resumed on July 22nd, counsel for the Service offered three records of conviction which were received over the objection for counsel for the respondent as follows. Exhibit 2 is a certificate of disposition from the State of New York for the offense of possession of marijuana. Exhibit 3 is a certificate of disposition from the State of New York for the offense of

sale of marijuana. Exhibit 4 is a record of conviction from the state of Maryland for the offense of possession of marijuana. The respondent had argument on the issue of removability but offered no evidence. The respondent was found to be removable as charged.

As relief from removal, the respondent sought to apply for cancellation of removal. However, that relief is not available to an alien convicted of an aggravated felony. Therefore, the respondent is not eligible for the relief sought.

ORDER

IT IS HEREBY ORDERED it is ordered that the respondent be removed from the United States to Jamaica on the charges contained in the Notice to Appear.

CHARLES A. WIEGAND, III
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dkt No: 01-2270
Filed August 27, 2003

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27th day of August two thousand three.

PHILLIP ANTHONY CARR,

Petitioner-Appellant,

—v.—

JANET RENO, Attorney General of the United States, KEVIN D. ROONEY, Acting Commissioner, Immigration and Naturalization Service, LYNN UNDERDOWN, Louisiana District Director, Immigration and Naturalization Service, IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPARTMENT OF JUSTICE,

Respondents-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Phillip Anthony Carr.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSANN B. MACKECHNIE, CLERK

By: /s/ ARTHUR M. HELLER
Arthur M. Heller,
Administrative Attorney

STATUTORY PROVISIONS INVOLVED

1. **Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1995).**

   Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

2. **Section 440(d) of Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).**

   CLASSES OF EXCLUDABLE ALIENS. –Section 212(c) of [the Immigration and Nationality Act]. . . is amended—

   (1) by striking "The first sentence of this" and inserting "this" ; and

   (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any

offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)."

3. **Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c), as amended by AEDPA § 440(d) (1997).**

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in sections 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).

4. **Section 304(b) of Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, 110 Stat. 3009–546 (September 30, 1996)**

REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.